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No. 99-1257

Supreme Court, U.S.
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In The

Supreme Court of the United States

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether Section 109 of the Clean Air Act, 42 U.S.C. § 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

2. Whether the court of appeals exceeded its jurisdiction by reviewing, as a final agency action that is ripe for review, EPA's preliminary preamble statements on the scope of the agency's authority to implement the revised "eight-hour" ozone NAAQS.

3. Whether provisions of the Clean Air Act Amendments of 1990 specifically aimed at achieving the long-delayed attainment of the then-existing ozone NAAQS restrict EPA's general authority under other provisions of the CAA to implement a new and more protective ozone NAAQS until the prior standard is attained.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

Respondent American Lung Association (ALA) was an intervenor in the court of appeals. ALA has no parent companies or nonwholly owned subsidiaries, and there is no parent or publicly held company owning 10% or more of ALA's stock.

The following were parties in one or both of the two consolidated proceedings addressed by this petition for certiorari (*American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1440 and consolidated cases; and *American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1441 and consolidated cases):

Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association)
American Farm Bureau Federation
American Forest & Paper Association
American Iron and Steel Institute
American Lung Association
American Petroleum Institute
American Portland Cement Alliance
American Public Power Association
American Road and Transportation Builders Association
American Trucking Associations, Inc.
Appalachian Power Company
Atlantic City Electric Company
Baltimore Gas and Electric Company
James Bassage
Burns Motor Freight, Inc.
Carolina Power & Light Company
Centerior Energy Corporation
Central and South West Services, Inc.
Central Hudson Gas & Electric Corporation

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Central Illinois Light Company
Central Illinois Public Service Company
Central Power and Light Company
Chamber of Commerce of the United States
Chemical Manufacturers Association
CINergy Corporation
Citizens for Balanced Transportation
Cleveland Electric Illuminating Company
Columbus Southern Power Company
ComEd Company
Consumers Energy Company
Dayton Power & Light Company
Delmarva Power & Light Company
Detroit Edison Company
Duke Energy Company
Duquesne Light Company
Edison Electric Institute
Equipment Manufacturers Institute
FirstEnergy Corporation (A merger of Centerior Energy Corporation and Ohio Edison Company)
Florida Power Corporation
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Judy's Bakery, Inc.
Kansas City Power & Light Company
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company

**RULE 29.6 DISCLOSURE,
AND LIST OF PARTIES BELOW** – Continued

Kentucky Power Company
Kentucky Utilities Company
Louisville Gas and Electric Company
Madison Gas and Electric Company
Commonwealth of Massachusetts
David Matusow
Brian McCarthy
Meridian Gold Company
State of Michigan
Midwest Ozone Group
Minnesota Power
Monongahela Power Company
Montaup Electric Company
National Association of Home Builders
National Association of Manufacturers
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
National Rural Electric Cooperative Association
National Small Business United
National Stone Association
Nevada Mining Association
State of New Jersey
Newmont Gold Company
Niagara Mohawk Power Corporation
Non-Ferrous Founders Society
Northern Indiana Public Service Company
Oglethorpe Power Corporation
State of Ohio
Ohio Edison Company
Ohio Mining and Reclamation Association
Ohio Power Company

**RULE 29.6 DISCLOSURE,
AND LIST OF PARTIES BELOW** – Continued

Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
Otter Tail Power Company
PacifiCorp
Pennsylvania Power & Light Company
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Edison Company, The
Potomac Electric Power Company
PP&L Resources
Public Service Company of New Mexico
Public Service Company of Oklahoma
Richard Romero
Salt River Project Agricultural Improvement and Power District
Small Business Survival Committee
South Carolina Electric & Gas Company
Southern Company
Southwestern Electric Power Company
Tampa Electric Company
Texas Gas Transmission Corporation
Toledo Edison Company
Union Electric Company
United Mine Workers of America, AFL-CIO
United States Environmental Protection Agency
Virginia Power
West Penn Power Company
West Texas Utilities Company
West Virginia Chamber of Commerce
State of West Virginia
Western Fuels Association
Wisconsin Electric Power Company

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GLOSSARY

ALA	American Lung Association
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
CD	Criteria Document
EPA	Environmental Protection Agency
FTCA	Federal Trade Commission Act
µg/m3	micrograms per cubic meter
NAAQŠ	National Ambient Air Quality Standards
03	ozone
OSHA	Occupational Safety and Health Act
PM	particulate matter
PM2.5	particles less than or equal to 2.5 microns in diameter
PM10	particles less than or equal to 10 microns in diameter
ppm	parts per million
RIA	Regulatory Impact Analysis
RTC	Response to Comments
SP	Staff Paper

CITATIONS TO DECISIONS ENTERED IN THE CASE

American Trucking Assns. v. USEPA, 175 F.3d 1027 (D.C. Cir. 1999), App. 1a,[1] *rehearing granted in part, denied in part*, 195 F.3d 4 (D.C. Cir. 1999), App. 90a; 62 Fed. Reg. 38652 (July 18, 1997); 62 Fed. Reg. 38856 (July 18, 1997).

BASIS FOR JURISDICTION

The D.C. Circuit's decision was entered on May 14, 1999, App. 1a, and rehearing was granted in part and denied in part on October 29, 1999. App. 90a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

U.S. Const., Art. I, § 1; Clean Air Act §§ 108, 109, 172, 181, 307, 42 U.S.C. §§ 7408, 7409, 7502, 7511, 7607; 40 C.F.R. §§ 50.7, 50.10. (*See* appendix to Environmental Protection Agency's petition.)

STATEMENT OF THE CASE

Acting pursuant to its duty to set national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety," Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1), the Environmental Protection Agency (EPA) has promulgated revised NAAQS for particulate matter (most importantly, for fine particles) and ozone. 62 Fed. Reg. 38711-12 (July 18, 1997), JA(PM) 61-62; 62 Fed. Reg. 38894-95 (July 18, 1997),

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[1] Appendix citations refer to the appendix filed by the Environmental Protection Agency with its petition for certiorari.

JA(O) 39-40.[2] With respect to particulate matter, EPA has estimated that 3,000-15,000 deaths, 6,000-10,000 hospital admissions for respiratory and cardiopulmonary causes, tens of thousands of cases of respiratory illness, and millions of days of missed work and restricted activity will be prevented each year just by *partial* attainment of the new standards. Regulatory Impact Analysis (RIA) 12-43, JA(PM) 3486. With respect to ozone, EPA has estimated that its new standards will each year prevent tens of thousands of occurrences of health effects including respiratory symptoms (such as pain on breathing), reductions in lung function, and asthma attacks (including hospital admissions and emergency room visits). 62 Fed. Reg. 38865/2-3, JA(O) 10; *id.* 38868/1, JA(O) 13.

Particulate matter. Particulate matter (PM) is a ubiquitous pollutant, consisting of fine particles produced largely by combustion or other high-temperature processes, and coarse particles mostly generated from mechanical processes through crushing and grinding. Criteria Document (CD) 3-145, JA(PM) 548; Staff Paper (SP) IV-3a, JA(PM) 1920. Over the years the public health significance of smaller particles has received increasing recognition. The original PM NAAQS promulgated in 1971 regulated particles up to 45 microns in diameter, 52 Fed. Reg. 24635/3 (July 1, 1987), JA(PM) 209, but EPA in 1987 promulgated revised NAAQS that addressed particles up to 10 microns in diameter ("PM10"). *Id.* 24663-64, JA(PM) 237-38. The PM NAAQS at issue here include a

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[2] The particulate matter joint appendix compiled in the court of appeals is cited as JA(PM), and the ozone joint appendix as JA(O).

new NAAQS addressing "fine" particles, defined as those 2.5 microns in diameter or less. 40 C.F.R. § 50.7(a)(1).

These NAAQS were promulgated following a detailed and thorough review conducted by EPA pursuant to its statutory obligation to review and (as appropriate) revise NAAQS at no more than five-year intervals. CAA § 109(d). As required by the Act, EPA's review of the PM NAAQS involved presenting a comprehensive review and assessment of the state of the science regarding particulate matter and its health and environmental effects in a "criteria" document, which was reviewed by a special scientific advisory committee (the Clean Air Scientific Advisory Committee, or CASAC). *See* CAA §§ 109(d); 108(a)(2). According to the final chapter of the Criteria Document, described by CASAC as the "best ever example of a true integrative summary of the state of knowledge about the health effects of airborne PM," Letter of March 15, 1996 from George T. Wolff to Carol M. Browner at 2, JA(PM) 3150,

> the extensive PM epidemiologic database that has evolved during the past several decades . . . includes recent studies providing evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban air sheds *even at concentrations below current U.S. PM standards.*

CD 13-1, JA(PM) 1779 (emphasis added). In sharp contrast to the "small" number of studies available in the 1987 PM review, 52 Fed. Reg. 24641/1, JA(PM) 215, and to other NAAQS reviews that have based standard-setting on a single study, 44 Fed. Reg. 8202/3 (February 8, 1979), JA(O) 3480 (noting that 1971 predecessor to the ozone

standard was based on a single study), the studies relied on in the 1997 PM review include "over 80" addressing short-term exposures, of which "[o]ver 60 . . . have found consistent, positive, significant associations between short-term PM levels and mortality and morbidity endpoints." SP V-54, JA(PM) 2011. *Accord, id.* V-61a, JA(PM) 2026 (listing additional statistically significant studies addressing long-term exposures). Significantly, when EPA plotted the results of the short-term exposure studies on a map, it concluded: "Although the highest PM-10 concentrations in the U.S. are in the West, most of the results in North America are from eastern communities, at PM-10 concentrations that are generally *below those permitted by the current standards.*" *Id.* front cover caption, JA(PM) 1900 (emphasis added).

As indicated, these PM-associated health effects include death, largely from respiratory and cardiovascular causes. SP V-58, JA(PM) 2019. In addition, the studies documented associations between particulate matter and exacerbation of emphysema and chronic bronchitis (which collectively are known as "chronic obstructive pulmonary disease"),[3] as well as pneumonia and cardiovascular disease. *Id.* V-20, 21 and 32, JA(PM) 1974, 1976, and 1989. These exacerbations can be serious enough to lead the affected individuals to visit the emergency room, and to lead attending physicians to order that they be admitted to the hospital. CD 13-30, JA(PM) 1808. Persons specially at risk from these effects include those over 65 years of age, as well as those below that age

[3] COPD is "the most common pulmonary cause of death, the fourth leading cause of death overall . . . , and a major cause of disability." SP V-33, JA(PM) 1990.

who have acute or chronic respiratory disease and/or cardiovascular disease, or who are current or former smokers. CD 13-92 to 13-94, JA(PM) 1870-72.

Having noted these effects, EPA found that fine particles – which differ in size, chemical composition and origin from coarse particles, SP IV-4 to IV-8, JA(PM) 1921-27 – were the appropriate indicator: "the fine particle studies consistently find positive, significant associations between fine particle levels and mortality and morbidity endpoints, with over 20 studies conducted in a number of geographic locations throughout the world, including the US, Canada, and Europe." SP V-76, JA(PM) 2047. Indeed, considering a study that compared the fine and coarse fractions, EPA found "clear evidence that fine particles are more likely to be responsible for the numerous observed associations between PM10 and mortality." SP V-64, JA(PM) 2031. *Accord, id.* V-67, JA(PM) 2037 (the 24-city study "provides clear evidence of an effect of fine particles that is independent of coarse fraction particles").

Considering these factors, and the near-unanimous recommendation of CASAC – including all four of the committee's epidemiologists – that a fine particle standard was warranted, Letter of June 13, 1996 from George T. Wolff to Carol M. Browner at Table 1, JA(PM) 3165, EPA opted to promulgate NAAQS for fine particles, measured as PM2.5. 62 Fed. Reg. 38711/3, JA(PM) 61 (setting annual standard at 15 µg/m3, and 24-hour standard at 65 µg/m3). The levels of the final standards are well within – indeed, "toward the middle portion of" – the range of protectiveness recommended by the eleven CASAC panelists who made recommendations as to level. Response to Comments (RTC) 29, JA(PM) 268.

Ozone. Like particulate matter, ozone is a widespread pollutant occurring in numerous regions of the United States. The primary ingredient in what is known as "smog," it is formed when two precursor pollutants (volatile organic compounds and nitrogen oxides) react to sunlight. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981); H.R. Rep. 490, 101st Cong., 2d Sess. 202 (1990).

Prior to 1997, the ozone NAAQS had focused on short-term concentrations measured over a one-hour averaging time. 36 Fed. Reg. 8187/3 (April 30, 1971), JA(O) 3540 (setting NAAQS at 0.08 ppm averaged over one hour); 44 Fed. Reg. 8220/3 (February 8, 1979), JA(O) 3498 (setting NAAQS at 0.12 ppm averaged over one hour). Subsequently, concern was raised by CASAC and others that "even in areas which do not repeatedly exceed the ozone standard, ozone concentrations can remain close to 0.12 ppm for several hours per day for extended periods of time in summer. There was concern based on recent controlled human exposure, epidemiology and toxicology studies, that such prolonged exposures could result in increased respiratory impairment." 58 Fed. Reg. 13018/2 (March 9, 1993), JA(O) 3459.

Several years after CASAC's observation, having compiled a revised criteria document addressing these and other studies, EPA noted that human experimental data documented health effects resulting from 6- to 8-hour exposures to ozone concentrations as low as 0.08 ppm:

> Based on a significant body of information available since the last review, there is now *clear evidence* from *human clinical studies* that O3 effects of concern are associated with the 6- to 8-hour exposures tested. . . . This includes evidence of the following statistically significant responses at 6- to 8-hour exposures to the *lowest concentration evaluated, 0.08 ppm O3*, at moderate exertion: lung function decrements, respiratory symptoms (e.g., cough, pain on deep inspiration), nonspecific bronchial responsiveness, and biochemical indicators of pulmonary inflammation.

62 Fed. Reg. 38863-64, JA(O) 8-9 (emphasis added). *See also id.* 38872/1, JA(O) 17 ("the bulk of the human health effects evidence supporting a decision on an appropriate O3 standard is based on controlled human exposure studies that relate known O3 exposures directly to responses in individuals").

Those most at risk from these effects are people who are active outdoors – *e.g.*, "active children and outdoor workers who regularly engage in outdoor activities." *Id.* 38859/3, JA(O) 4. In contrast to the studies underlying the prior NAAQS, which measured effects based on heavy exertion, the newer studies showed health effects under moderate exertion – a matter of concern because "[m]oderate exertion levels are more frequently experienced by individuals than heavy exertion levels." *Id.*

In addition to outdoor exertion, other factors increasing risk of harm from ozone exposure include respiratory impairments such as asthma. *Id. Accord*, CD 9-26, JA(O) 1767 ("The magnitude of individual changes can become more important in persons with impaired respiratory systems (e.g., asthmatics) who already have reduced baseline lung function."). EPA heard vivid testimony concerning the effects of ozone on asthmatics:

> When I was four years old, I was playing outside on a really hot day and I started wheezing

and my lungs started tightening up. So I came in and told my mom.

We went to the doctor the next day and the doctor said I had asthma. The worst thing about having an asthma attack is that it almost feels like you are going to die because your lungs close up and it is really hard to breathe.

The last two summers have been really bad for me. On days when the ozone is bad, I can't even go outside to play.

IV-F-84a at 168-69, JA(O) 3394-95 (ten-year-old Bethany Myles of Chicago).

When there are ozone warnings, I can't be out of the air-conditioning. If I do go outside, I have an asthma attack. An asthma attack feels like I am suffocating. No one should have to feel this way.

Id. at 39, JA(O) 3389 (ten-year-old Jeff Damitz of Chicago). EPA estimated that twelve million Americans – one in twenty – are asthmatic. SP 39, JA(O) 1849.

Non-asthmatics likewise are at risk if they happen to be among those who are more sensitive to ozone: "[t]here is a large range of physiological responses among humans, with at least a 10-fold difference between the most and least responsive individuals." CD 9-4, JA(O) 1744. *See* McDonnell (1991), II-I-316, at 149, JA(O) 2775 (human clinical study at 0.08 ppm produced lung function decrements as high as 37.9%); RTC 81 ¶ 5, JA(O) 161 (in human clinical studies at 0.08 ppm, 10% of individuals had lung function decrement ≥20%). EPA heard testimony from these sensitive individuals as well:

We had at least 26 days this summer of "unhealthful" ground level ozone under the ME [Maine] standard of .08 ppm. That's a big part of our summer, a very big part. This ground level ozone is a real problem, a serious problem.

It's not just a statistical problem, either, because some standard was exceeded. I can feel it personally. I have exercised vigorously outside on "unhealthful" days and become physically sick – a funny nauseous feeling with a headache.

IV-F-102 at 1, JA(O) 3380 (Charles M. Sexton of South Portland, ME).

After considering the results of the studies, and the American Thoracic Society's criteria for defining which health effects should be considered adverse, EPA concluded that "responses of some sensitive individuals [to 0.08 ppm] *are sufficiently severe and extended in duration to be considered adverse.*" 62 Fed. Reg. 38864/1, JA(O) 9 (emphasis added).

In addition to the human experimental data, EPA also noted that "[n]umerous epidemiological studies have reported excess hospital admissions and emergency department visits for respiratory causes (for asthmatic individuals and the general population) attributed primarily to ambient O3 exposures, *including O3 concentrations below the level of the current standard.*" *Id.* (emphasis added). As the Criteria Document noted, these studies "provide *strong evidence* that ambient exposures to O3 can cause *significant exacerbations of pre-existing respiratory disease* in the general public at concentrations below 0.12 ppm O3." CD 7-171, JA(O) 1624 (emphasis added). EPA determined that "increased hospital admissions and emergency room visits . . . are clearly adverse to individuals." 62 Fed. Reg. 38864/2, JA(O) 9.

In short, the evidence before EPA showed that health effects of concern (including adverse health effects) were occurring at levels allowed by the previous NAAQS, and at longer averaging times (6-8 hours, not just one hour). CASAC concluded that a new, eight-hour NAAQS was

necessary: "It was . . . the consensus of the Panel that an 8-hour standard was more appropriate for a human health-based standard than a 1-hour standard." Letter of November 30, 1995 from George T. Wolff to Carol M. Browner at 2, JA(O) 237.

In acting on CASAC's consensus recommendation that an eight-hour NAAQS be set, EPA considered setting the level of the eight-hour standard at 0.09 ppm, which is the eight-hour level most comparable in protectiveness to the one-hour 0.12 ppm NAAQS. 61 Fed. Reg. 65725/2, JA(O) 51. Given the evidence documenting adverse health effects at levels allowed by the one-hour standard, EPA unsurprisingly rejected this option in favor of a more protective standard.

EPA presented the results of a risk assessment, which concluded that tens of thousands more members of the group of greatest concern – children who are active outdoors – would suffer respiratory impairment and symptoms at a 0.09 ppm NAAQS than at a 0.08 ppm NAAQS. 62 Fed. Reg. 38865/2-3, JA(O) 10 (as compared to a 0.08 ppm NAAQS, a 0.09 ppm NAAQS would subject 70,000 more children to lung function decrements ≥15%, 39,000 more children to decrements ≥20%, and 14,000 more children to moderate or severe pain on deep inspiration). These figures applied only to nine urban areas, *id.* 38868/1 ¶ 2, JA(O) 13, and thus underestimate the number of ozone-induced effects that would occur nationwide.

The assessment also concluded that in New York City alone, a 0.09 ppm NAAQS would result in 40 more excess hospital admissions of asthmatics per ozone season than a 0.08 standard. *Id.* 38868/1, JA(O) 13. Even for that one city, this figure is "indicative of a pyramid of much larger

numbers of related O3-induced effects, including respiratory-related hospital admissions among the general population, emergency and outpatient department visits, doctors visits, and asthma attacks and related increased use of medication that are important public health considerations." *Id.*

EPA also considered other scientifically documented effects of 6- to 8-hour exposure to 0.08 ppm, including "increased nonspecific bronchial responsiveness (related, for example, to aggravation of asthma), decreased pulmonary defense mechanisms (suggestive of increased susceptibility to respiratory infection), and indicators of pulmonary inflammation (related to potential aggravation of chronic bronchitis or long-term damage to the lungs)." *Id.* 38868/1-2, JA(O) 13.

After weighing the evidence, EPA opted for an eight-hour standard at 0.08 ppm, a level consistent with the recommendations of CASAC. Letter of November 30, 1995 from George T. Wolff to Carol M. Browner at 3, JA(O) 238 (of ten panel members who expressed views, three favored 0.08 ppm, one endorsed a range of 0.08-0.09 ppm, and two endorsed the range presented by EPA (i.e., 0.07-0.09 ppm)).

Proceedings Below. In the D.C. Circuit, industry and state petitioners challenged the new NAAQS on a number of grounds in petitions for review under Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1). American Lung Association, the oldest voluntary health organization in the United States, intervened to oppose weakening of the new NAAQS.

The D.C. Circuit did not in any way question the validity of the science relied upon by EPA concerning either PM or ozone, and on the contrary found that EPA's

decision to set fine particle NAAQS "easily" satisfied the statutory standard. App. 55a. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." App. 55a-56a.

Nonetheless, the D.C. Circuit held that the Clean Air Act, and EPA's interpretation of it, violate the nondelegation doctrine. App. 14a. The court also sharply limited (or, according to industry respondents' and Ohio's interpretation of the court's decision, eliminated) EPA's authority to implement the new eight-hour ozone NAAQS. App. 34a, 37a-44a, 79a-82a.

SUMMARY OF THE ARGUMENT

Nondelegation. As demonstrated by numerous precedents of this Court upholding broader statutory delegations, the Clean Air Act's mandate for NAAQS that "protect the public health" with "an adequate margin of safety," § 109(b)(1), provides an ample "intelligible principle" to satisfy the nondelegation doctrine. Moreover, that mandate draws further meaning from the context of the Act (specifically, the fields of medicine, epidemiology, and other public health disciplines), from the legislative history, and from 1977 amendments establishing a uniform basis for health-based standard-setting. In addition, the D.C. Circuit itself has repeatedly conducted judicial review of NAAQS for two decades. It is unsustainable to contend on the one hand that the Act provides sufficient "law to apply" to enable such review, *see Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971),

and on the other that Congress has failed to supply an intelligible principle.

The D.C. Circuit's assertion that the nondelegation doctrine requires a "determinate criterion" is refuted by precedent of this Court repeatedly upholding delegations under thoroughly nondeterminate standards, as well as by *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and other precedent of this Court recognizing that Congress may legitimately write ambiguous (*i.e.*, nondeterminate) statutes that require agencies to make policy choices.

Because the Clean Air Act plainly satisfies the nondelegation doctrine, the D.C. Circuit's constitutional inquiry should have stopped there – there was no occasion to proceed to a constitutionally based examination of EPA's interpretation, much less a constitutionally based narrowing of that interpretation. This case is fundamentally different from *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*"), where a plurality undertook a narrowing interpretation of a far broader delegation that required EPA to balance health against other factors. Moreover, unlike in *Benzene*, where evidence of harm was lacking even at pollutant levels an order of magnitude higher than the standard set by the agency, here EPA has set both the fine particle and ozone NAAQS in the range in which compelling scientific evidence documents adverse health effects. There was no basis for the D.C. Circuit to offer an advisory opinion on whether EPA could constitutionally set NAAQS at levels lower than the ones chosen. Likewise, given that the nondelegation argument in this case was raised only by parties seeking *less* stringent NAAQS, there was no basis

for the D.C. Circuit to require that EPA mount a constitutional defense of its decision not to set *more* stringent NAAQS.

Ozone Implementation. The D.C. Circuit correctly held that the 1990 Amendments do not bar EPA from revising ozone NAAQS or issuing nonattainment designations under revised NAAQS. The court incorrectly held, however, that Subpart 2 of the Act governs implementation of the new ozone NAAQS. It is *Subpart 1* that expressly sets forth requirements for compliance with "*any* revised standard, *including a revision of any standard in effect on November 15, 1990.*" § 172(a)(1)(A) (emphasis added).

The Subpart 2 provisions relied on by the D.C. Circuit are based on the pre-existing ozone NAAQS, and therefore do not oust the Subpart 1 provisions governing classifications and attainment dates under the *new* NAAQS. First, for the numerous areas that violate the new NAAQS yet have a design value less than 0.121, the Subpart 2 classification table provides no classifications or attainment dates. Second, for areas that violate the new NAAQS and have a design value of 0.121 or greater, the Subpart 2 classifications and attainment dates cannot be applied to the new NAAQS without causing absurd results: specifically, attainment dates that *predate* the 1997 promulgation date of the new NAAQS.

With respect to control measures, the D.C. Circuit did not even point to any statutory provision that allegedly ousts the Subpart 1 requirements, and no such provision exists. Moreover, applying the Subpart 2 control measure provisions to the new NAAQS would produce absurd results – specifically, pollution control plan submission deadlines that *predate* the 1997 promulgation date of the new NAAQS.

Finally, according to industry respondents and Ohio, the D.C. Circuit went beyond simply holding that Subpart 2 governs the new ozone NAAQS – they read the D.C. Circuit's decision as precluding EPA from implementing the new NAAQS *at all, ever*. This reading reduces the Act to an absurdity, and ignores the Act's core public health purpose by allowing millions of Americans to continue being exposed to pollution levels that cause asthma attacks and other adverse health effects. Moreover, this reading conflicts with the D.C. Circuit's own interpretation of Subpart 2: it is untenable to advocate an interpretation of the Act that presupposes the existence of Subpart 2 classifications and attainment dates for the new NAAQS, while simultaneously denying that Subpart 2 imposes *any* date for attainment of that NAAQS.

ARGUMENT

This Court has recognized that the 1970 Clean Air Act, which enacted the § 109(b)(1) mandate to set NAAQS that "protect the public health" with "an adequate margin of safety," responded to "threats to human health [that] were regarded as urgent." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). *See also Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975) (under the pre-1970 Act, "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so;" the response of the States was "disappointing," and brought "little progress;" "Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970," which "sharply increased federal authority and responsibility in the continuing effort to combat air pollution.").

Three decades after Congress took this urgent step, the promise of clean air embodied in the 1970 legislation remains unrealized. Persistent unhealthy levels of PM and ozone are the most important reason for that continuing failure. No other pollutant comes close to these in the number of deaths, illnesses, and other adverse effects caused.

For over ten years, the American Lung Association – along with many other concerned organizations and individuals, including many scientists, physicians, and public health professionals – has worked to combat this problem by advocating the adoption of more protective NAAQS. As the record of this proceeding abundantly documents, the pre-existing NAAQS are simply not adequate to the task of protecting public health. At pollution levels allowed by those NAAQS, large numbers of people are dying, being driven to the hospital, and suffering pain and discomfort – all for the simple act of breathing the air.

Compared with their predecessors, the fine particle and ozone NAAQS remanded by the D.C. Circuit represent a major step forward towards control of this pollution. Currently, many millions of people are exposed to harmful levels of PM and ozone pollution, yet live in areas where the pre-existing NAAQS for those pollutants are met. P. 4, *supra* (most studies finding adverse PM-related health effects were from eastern U.S., where PM concentrations meet the pre-existing NAAQS); 62 Fed. Reg. 38868/2, JA(O) 13 ("approximately 46 million more people, including approximately 13 million more children and 3 million more individuals with asthma, live in areas that would not attain a 0.08 ppm standard compared to a 0.09 ppm standard"); 61 Fed. Reg. 65725/2, JA(O) 51 (0.09 ppm is

the eight-hour level most equivalent to the pre-existing one-hour NAAQS).

EPA's new NAAQS will extend much-needed protection to these many people, as well as ensuring that clean-up activities in areas currently violating the pre-existing NAAQS will prevent more adverse health effects. The prospect is striking: the new NAAQS are expected to prevent thousands of deaths and hospital admissions each year, as well as tens of thousands of cases of respiratory and cardiopulmonary illness and millions of days of missed work and restricted activity. Pp. 2, 10, *supra*. The D.C. Circuit's decision will at best greatly delay and at worst outright prevent these public health benefits from being realized, and will condemn millions of Americans to continued exposure to harmful air pollution associated with premature death, hospital admissions, and other adverse health effects.

I. THE CLEAN AIR ACT, AND EPA'S INTERPRETATION OF THE ACT, PASS MUSTER UNDER THE NONDELEGATION DOCTRINE.

A. The Clean Air Act Sets Forth Intelligible Principles Sufficient to Satisfy the Nondelegation Doctrine.

Recognizing that "Congress simply cannot do its job absent an ability to delegate power under broad general directives," this Court has held that, "[s]o long as Congress 'shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.' " *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (emphasis added). After overturning two statutes

over sixty years ago, the Court has since "upheld, without exception, delegations under standards phrased in sweeping terms." *Loving v. United States*, 517 U.S. 748, 771 (1996).

(1) The Language of the Act, Both Alone and Considered in Light of the Statutory Context and Legislative History, Establishes Intelligible Principles.

1970 Act. Contrary to the D.C. Circuit's conclusion, App. 5a (stating that "no[ ] [intelligible principle] is . . . apparent from the statute"), the Clean Air Act sets forth intelligible principles to guide EPA's implementation. The Act provides that primary NAAQS must be standards which, "allowing an adequate margin of safety, are requisite to protect the public health." § 109(b)(1). Given that "one cannot plausibly argue" that there is a nondelegation problem in a statute authorizing regulation of an "imminent hazard to the public safety," *Touby v. United States*, 500 U.S. 160, 165 (1991), a nondelegation challenge to § 109(b)(1) is equally implausible. Indeed, this Court has upheld far broader standards in numerous cases, including statutes conferring authority to fix "fair and equitable" prices, to recover "excessive" profits, and even to regulate broadcast licensing in the "public interest." App. 59a-60a (Tatel, J., dissenting) (citing cases).

Moreover, the Act's "public health" standard takes further meaning from its context. *See Natl. Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (the statutory phrase "public interest, convenience, or necessity" in the Communications Act "is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services . . . ") (citation

omitted). There can be few if any fields of human endeavor that have a history longer than, or have arrived at a level of sophistication comparable to, the study and protection of human health. Thus the profession of medicine, and related public health disciplines such as epidemiology and toxicology, furnish a detailed context for § 109(b)(1)'s "public health" mandate. Indeed, this context is expressly linked by statute to EPA's standard-setting duties, through the requirements that standards be "based on" air quality criteria that "accurately reflect the latest scientific knowledge" concerning health effects, §§ 108(a)(2), 109(b)(1), and that EPA convene an expert "scientific review committee" and respond to its recommendations. §§ 109(d)(2), 307(d)(3).

Further constraining the delegation is the statutory requirement that EPA include a detailed statement of basis and purpose in the proposed rule (including an explanation for rejecting any recommendations of the scientific advisory committee), and another such statement in the final rule (including a response to significant public comments and new data, and an explanation of changes from the proposal). § 307(d)(3)-(6). *See Yakus v. United States*, 321 U.S. 414, 426 (1944) ("[t]he standards prescribed by the present Act, *with the aid of the 'statement of the considerations' required to be made by the Administrator*, are sufficiently definite and precise" to survive nondelegation challenge) (emphasis added).

In addition, though the statutory text by itself offers more than sufficient specificity to pass muster under this Court's nondelegation precedent, substantial additional guidance is provided by the legislative history. S. Rep. 1196, 91st Cong., 2d Sess. 10 (1970) (NAAQS must protect

"particularly sensitive citizens such as bronchial asthmatics and emphysematics who in the normal course of daily activity are exposed to the ambient environment;" in particular, NAAQS must ensure "an absence of adverse effect on the health of a statistically related sample of persons in sensitive groups;" such a sample is "the number of persons necessary to test in order to detect a deviation in the health of any person within such sensitive group which is attributable to the condition of the ambient air"); *id.* (the "margin of safety" requirement is designed to provide "a reasonable degree of protection . . . against hazards which research has not yet identified").

1977 Amendments. Further congressional guidance defining the scope of the delegation is provided by a 1977 package of amendments addressing the "Basis of Administrative Standards," Pub. L. No. 95-95, § 401, 91 Stat. 790-91 (August 7, 1977), designed to establish "a standardized basis for future rulemaking to protect the public health." H.R. Rep. 294, 95th Cong., 1st Sess. 50 (1977) ("1977 House Report"). The impetus for these amendments was provided by *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), where the en banc D.C. Circuit upheld EPA regulations on leaded gasoline. Rejecting industry's argument that EPA was required to document "proof of actual harm" as a prerequisite to regulation, the D.C. Circuit upheld EPA's conclusion that the Act contemplates regulation where there is "a significant risk of harm." *Id.* 12-13. Noting the newness of many human alterations of the environment, the court found:

> Sometimes, of course, relatively certain proof of danger or harm from such modifications can be readily found. But, more commonly, "reasonable medical concerns" and theory long precede certainty. Yet the statutes – and common sense – demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.

Id. 25. *Accord, id.* ("Awaiting certainty will often allow for only reactive, not preventive, regulation."). Recognizing "the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist," *id.* 24, and "the established maxim that health-related legislation is liberally construed to achieve its purpose," *id.* 31, the D.C. Circuit upheld EPA's precautionary approach. Specifically addressing § 109, the court found that § 109's margin of safety requirement mandates that NAAQS "be preventive in nature." *Id.* 15.

The drafters of the 1977 Amendments indicated their intent to "support the views expressed" in *Ethyl*, and to "apply this interpretation to *all* other sections of the act relating to public health protection." 1977 House Report at 49 (emphasis added). *Accord, id.* 50 n.3 (emphasizing intent "to require application of these factors to standard-setting under *all* sections of the act") (emphasis added). Specifically, the drafters intended *inter alia* to

- "emphasize the precautionary or preventive purpose of the act (and, therefore, the Administrator's duty to assess risks rather than wait for proof of actual harm)," and thus "to assure that regulatory action can effectively prevent harm before it occurs." *Id.* 51, 49.
- "emphasize the predominant value of protection of public health." *Id.* 49.
- "assure that the health of susceptible individuals, as well as healthy adults, will be encompassed in the term 'public health,' regardless of the section of the act under which the Administrator proceeds." *Id.* 50.

While the 1977 Amendments, like the 1970 Amendments, reaffirm the preeminent role of public health protection, the 1977 drafters also cautioned that EPA's standard-setting authority is "not . . . a license for 'crystal ball' speculation. The Administrator's judgment must, of course, remain subject to restraints of reasoned decision-making." *Id.* 51. Thus, the Administrator's power to assess risks " 'does not permit him to act on hunches or wild guesses; . . . his conclusions must be rationally justified.' " *Id.* 45 (citation omitted). *Accord*, *Ethyl*, 541 F.2d at 28.

Congress implemented these principles by enacting similar amendments to several provisions of the Act. Pub. L. No. 95-95, § 401, 91 Stat. 790-91 (August 7, 1977). These amendments are relevant to the setting of NAAQS, for two reasons. First, among the provisions amended was § 108(a)(1). *Id.* § 401(a). The effect of this amendment was to require listing of pollutants that *might* harm human health, even where actual proof of such harm is lacking. Because listing under § 108 requires regulation under § 109, *Ethyl*, 541 F.2d at 15 n.23, Congress's amendment of § 108 expressed its intent that NAAQS also protect against suspected and not merely demonstrated harm. Second, even apart from the change to § 108, the package of amendments in § 401 of the 1977 Amendments expressed Congress's intent to adopt a standardized basis for public-health-based rulemaking under the Act. *See* p. 21, *supra* (quoting 1977 House Report). Rulemaking under §§ 109(b)(1) and (d)(1) is designed to protect the public health, and thus is necessarily subject to this standard.[4]

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[4] The absence of § 109 from the sections amended is for an obvious reason: § 109 had already been held by the D.C. Circuit to be precautionary, *see* p. 21, *supra* (citing *Ethyl*). By contrast, § 108 had been held to require a "firm threshold finding" of "known adverse effects or actual harm" before a pollutant could be listed for regulation, *Ethyl*, 541 F.2d at 14 & n.20, thereby necessitating amendment in order to adopt a precautionary approach.

Thus, the 1977 amendments provide further intelligible principles sufficient to defeat a nondelegation challenge.

(2) Because the Clean Air Act Provides Sufficient Specificity to Permit Judicial Review, It Necessarily Also Provides Sufficient Intelligible Principles to Satisfy the Nondelegation Doctrine.

This Court has held that if Congress has spoken with sufficient clarity to enable the courts to review agency implementing actions, then the nondelegation doctrine is necessarily satisfied. *Yakus*, 321 U.S. at 426 (delegation would be improper "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be *impossible* in a proper proceeding to ascertain whether the will of Congress has been obeyed") (emphasis added).

Indeed, any other conclusion would conflict with other precedent of this Court providing that review of agency action is unavailable only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply,' " *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (citation omitted) – *i.e.*, where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v.*

Chaney, 470 U.S. 821, 830 (1985). It would be fundamentally contradictory to hold that Congress has provided sufficient "law to apply" to enable judicial review – and then to conclude that Congress has *failed* to provide an "intelligible principle" sufficient to enable such review.

The D.C. Circuit itself has reviewed EPA's decisions under § 109(b)(1) repeatedly, judging those decisions against congressional intent as set forth in the Act and legislative history. *Lead Industries Assn. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981); *Natural Resources Defense Council v. Administrator*, 902 F.2d 962 (D.C. Cir. 1990); *American Lung Assn. v. EPA*, 134 F.3d 388 (D.C. Cir. 1998). As those opinions make clear, the D.C. Circuit was fully able to discern intelligible congressionally established principles sufficient to permit judicial review. *See, e.g., ALA*, 134 F.3d at 389 ("NAAQS must be set at a level at which there is an absence of adverse effect on [ ] sensitive individuals.") (internal quotations omitted); *Lead Industries*, 647 F.2d at 1152 & 1153 (same); *API*, 665 F.2d at 1186 ("[i]n setting margins of safety the Administrator need not regulate only the known dangers to health, but may 'err' on the side of overprotection"); *NRDC*, 902 F.2d at 972 (same).

Two additional, en banc D.C. Circuit decisions further confirm this conclusion. In *Ethyl*, the Court found meaning in § 109, and enunciated detailed principles on the setting of health-based clean air standards – principles that were ratified by Congress in 1977. *See* pp. 20-22, *supra*.

In *Natural Resources Defense Council v. USEPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"), a unanimous en banc D.C. Circuit – including both members of the

majority in the present case – construed and found meaning in CAA § 112's mandate to "provide[ ] an ample margin of safety to protect the public health." Expressly relying on the legislative history of § 109 (specifically, the 1970 Senate Report language quoted *supra* at 19-20), the court held that the margin of safety requirement "comports with the historical use of the term in engineering as 'a safety factor . . . meant to compensate for uncertainties and variabilities.' " 824 F.2d at 1152 (citation omitted). *See also id.* 1153, 1165 (further explaining the "margin of safety" requirement by reference to – *inter alia* – the "significant risk" standard adopted by the plurality in *Benzene*). While the D.C. Circuit's interpretation of § 112 differs in certain respects from its interpretation of § 109, *NRDC v. Administrator*, 902 F.2d at 973-74, the key point for nondelegation purposes is that the court was able to find meaning in a phrase ("margin of safety") that appears in § 109(b)(1). Accordingly, the unanimous en banc *Vinyl Chloride* decision further confirms that § 109(b)(1) establishes intelligible principles.

(3) The Clean Air Act Clearly Satisfies The Nondelegation Approaches Espoused by Chief Justice Rehnquist and Justice Scalia.

Not only does the Clean Air Act easily pass muster under the precedent of this Court – it also clearly satisfies the approaches advocated in *dissent* by Chief Justice Rehnquist and Justice Scalia. *Benzene*, 448 U.S. at 671 (Rehnquist, J.); *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490, 543 (1981) ("*Cotton Dust*") (Rehnquist, J.); *Mistretta*, 488 U.S. at 412 (Scalia, J.).

Chief Justice Rehnquist. In *Benzene* and *Cotton Dust*, then-Justice Rehnquist argued that the Occupational

Safety and Health Act violated the nondelegation doctrine, but based this conclusion on that statute's *feasibility* requirement: "the insertion into § 6(b)(5) of the words 'to the extent feasible' rendered what had been a clear, if somewhat unrealistic, statute into one so vague and precatory as to be an unconstitutional delegation." *Cotton Dust*, 452 U.S. at 545. By contrast, the bill as introduced contained no feasibility provision:

> Prior to the inclusion of the "feasibility" language, § 6(b)(5) simply required the Secretary to "set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health. . . . " . . . Had that statute been enacted, it would undoubtedly support the result the Court reaches in these cases, and it *would not have created an excessive delegation problem*. The Secretary of Labor would quite clearly have been authorized to set exposure standards without regard to any kind of cost-benefit analysis.

Id. (emphasis added). As will be shown by the briefing in No. 99-1426, the Clean Air Act – like the original OSHA bill that never became law – requires standards to be based on health "without regard to any kind of cost-benefit analysis." Accordingly, even under the strong version of the nondelegation doctrine espoused by Chief Justice Rehnquist, the Act clearly passes muster.

Justice Scalia. In *Mistretta*, Justice Scalia contended that the Sentencing Reform Act created an unconstitutional delegation. Though agreeing that the lenient "intelligible principle" test was met, 488 U.S. at 415-16, Justice Scalia contended that the Act had transgressed "the Constitution's *structural* restrictions that deter excessive delegation." *Id.* at 417 (emphasis added). Specifically, that

statute had delegated lawmaking authority to the Sentencing Commission, a body that "neither exercises any executive power on its own, nor is subject to the control of the President who does." *Id.* at 420.

Unlike the Sentencing Commission, EPA is not only subject to the control of the President (who appoints the Administrator), but also exercises direct executive power. In particular, once NAAQS are established EPA approves (or disapproves) state pollution control plans to attain the NAAQS, promulgates federal pollution control plans to attain the NAAQS, and enforces the plans thus approved and promulgated. CAA §§ 110(a) & (k), 110(c)(1), 113, 42 U.S.C. §§ 7410(a) & (k), 7410(c)(1), 7413. Moreover, EPA entertains and rules on petitions for abatement of interstate air pollution contributing to violations of the NAAQS, and enforces rulings issued pursuant to such petitions. CAA §§ 126, 113, 42 U.S.C. §§ 7426, 7413. Thus, the Clean Air Act satisfies the structural delegation approach espoused by Justice Scalia.

B. The Nondelegation Doctrine Does Not Require a "Determinate Criterion."

(1) A "Determinate Criterion" Test Is Unsupportable Given the Nondeterminate Language in the Constitution Itself, and Contravenes This Court's Precedent Repeatedly Upholding Nondeterminate Statutes.

The core of the D.C. Circuit's nondelegation ruling is the incorrect assertion that a delegation must be limited by a "determinate criterion for drawing lines" in order to pass constitutional muster. App. 6a. First, the Constitution itself contains nondeterminate provisions. *See, e.g.*,

Am. VIII ("[e]xcessive" bail and "excessive" fines); Am. II ("well regulated" militia); Am. IV ("unreasonable" searches and seizures, and warrants "particularly" describing the place or person to be searched or seized); Am. V ("due" process, and "just" compensation). Congress cannot be held to have acted unconstitutionally when it has spoken with the same kind of nondeterminate language used in the Constitution itself. *See Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (citing Eighth Amendment as grounds for rejecting a nondelegation doctrine challenge to the phrase "excessive profits" in the Renegotiation Act).

Second, the D.C. Circuit's test conflicts with the precedent of this Court, which requires only an "intelligible principle," not a determinate criterion – and which has repeatedly upheld delegations under thoroughly nondeterminate standards such as "fair and equitable" prices, "excessive" profits, and even the "public interest." *See* p. 18, *supra*. *See also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399-400 (1940) ("The difficulty or impossibility of drawing a statutory *line* is one of the reasons for supplying merely a statutory *guide*.") (emphasis added); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 145-46 (1941) (Congress is not constitutionally barred from "accept[ing] the administrative judgment as to the relative weights to be given to the[ ] [statutory] factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases"); *Lichter*, 334 U.S. at 785 ("It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the

congressional policy to infinitely variable conditions constitute the essence of the program."); *Yakus*, 321 U.S. at 425 ("it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date"); *United States v. Rock Royal Co-op*, 307 U.S. 533, 577 (1939) ("This price cannot be determined by mathematical formula but the standards give ample indications of the various factors to be considered by the Secretary.").

Moreover, the standard adopted by the plurality in *Benzene* to avoid a possible nondelegation issue – "significant risk" – is likewise nondeterminate. *Benzene*, 448 U.S. at 655-56 (significant risk standard "is not a mathematical straitjacket," and "cannot be based solely on a resolution of the facts," but "will be based largely on policy considerations;" the agency "is free to use conservative assumptions in interpreting the data," "risking error on the side of overprotection rather than underprotection").

(2) A "Determinate Criterion" Test Contravenes *Chevron* and Other Precedent of this Court Recognizing that Congress May Legitimately Leave Policy Decisions to Be Made By Agencies.

Under this Court's precedent, the nondelegation doctrine does not preclude Congress from writing statutes that allow an agency "to exercise judgment on matters of policy." *Mistretta*, 488 U.S. at 378. For example, statutes may be worded in sufficiently broad terms to allow more than one possible interpretation, thereby allowing an

agency to exercise policy judgment to decide which interpretation should be adopted. This principle is illustrated by *Cotton Dust*, where concern was expressed by a dissenting Justice that Congress had written the Occupational Safety and Health Act so broadly as to allow three possible interpretations concerning the role of cost-benefit analysis: that Congress "required" the agency to engage in such analysis, that it "prohibited" the agency from doing so, or that it "permitted" the agency to do so. 452 U.S. at 545, 548 n.* (Rehnquist, J.). The majority squarely held that such statutory flexibility would *not* create a delegation problem: "Even [if] . . . there were three possible constructions of the phrase 'to the extent feasible[,]' . . . *this would hardly have been grounds for invalidating § 6(b)(5) under the delegation doctrine*. After all, this would not be the first time that more than one interpretation of a statute had been argued." *Id.* at 541 n.75 (emphasis added). The D.C. Circuit's demand for a "determinate criterion" squarely conflicts with *Cotton Dust*'s recognition that Congress may write nondeterminate statutes that are susceptible to conflicting interpretations.

The principle recognized in *Cotton Dust* subsequently found expression in the seminal case of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron* Step Two, which applies where Congress has "delegat[ed]" to an agency authority to interpret a statute, the reviewing court must uphold the agency interpretation if it is "reasonable." *Id.* 843-44. *Chevron* Step Two necessarily presupposes that Congress may lawfully write statutes that are ambiguous and therefore subject to differing interpretations – indeed, diametrically opposing ones. *Id.* 863 ("The fact that the agency has from

time to time changed its interpretation of the term 'source' does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute."). Indeed, *Chevron* expressly acknowledged that it is proper for Congress to punt policy decisions to agencies, rather than resolving them itself. *Id.* 865-66 (administrative agency can properly "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or *intentionally left to be resolved by the agency* charged with the administration of the statute") (emphasis added). The D.C. Circuit's "determinate criterion" test would undermine *Chevron* by holding that ambiguous statutes raise constitutional problems – thus transforming routine *Chevron* Step Two statutory review into *constitutionally* based nondelegation doctrine review. *See* App. 76a.

(3) *Schechter* Refutes a "Determinate Criterion" Test.

In an attempt to support its holding, the D.C. Circuit misquoted *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), for the proposition that where standards affect the whole economy, Congress must craft a "more precise" delegation. App. 12a (allegedly quoting *Schechter*). This purported standard appears nowhere in *Schechter*, and in any event offers no support for a "determinate criterion" test. Far from demanding such a criterion, *Schechter* took pains not to question the validity of the Federal Trade Commission Act's multi-industry proscription of "unfair methods of competition," even though that standard was decidedly *non*determinate. *Id.* at 532-33 (the FTCA standard "does not admit of precise definition," but rather its contours are "to be determined

in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest").

C. Because Congress Prescribed Intelligible Principles, the Nondelegation Doctrine Provides No Basis for a Narrowing Construction of the Act.

(1) Requiring EPA to Narrow Its Interpretation of the Act Is Unwarranted in Light of the Act's Clear Constitutionality, Will Not Serve the Purpose of the Nondelegation Doctrine, and Contravenes Precedent of this Court.

The D.C. Circuit not only held that the Act offers no intelligible principle, but also proceeded to strike down EPA's interpretation of the Act on constitutional grounds. Because the Clean Air Act offers an intelligible principle, however, the D.C. Circuit's constitutional inquiry should have stopped there – there was no occasion to proceed to a constitutionally based examination of EPA's interpretation, much less to require a constitutionally based narrowing of that interpretation. *Mistretta*, 488 U.S. at 373 n.7 (recent application of nondelegation doctrine has been principally limited "to giving narrow constructions to statutory delegations *that might otherwise be thought to be unconstitutional*") (emphasis added).

Moreover, the D.C. Circuit's novel constitutional requirement that a narrowing interpretation be adopted *by the implementing agency* will do nothing to serve the purpose of the nondelegation doctrine (which is designed to preserve *Congress's* constitutionally conferred legislative authority, U.S. Const., Art. I, § 1), and in any event is flatly contrary to precedent of this Court. *American Power*

& Light Co. v. SEC, 329 U.S. 90, 106 (1946) (nondelegation doctrine does not require "that the legislative standards be translated by the [agency] into formal and detailed rules of thumb prior to their application to a particular case. If th[e] agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.").

(2) The Present Case Differs Fundamentally from Those Where Narrowing Constructions Have Been Undertaken.

The two decisions cited by *Mistretta* as having adopted narrowing constructions (488 U.S. at 373 n.7) both differ fundamentally from the present case. First, *Natl. Cable Television Assn. v. United States*, 415 U.S. 336 (1974), involved an agency usurpation of Congress's power of taxation, *id.* at 341 (it would be "a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power"), and a far more sweeping statutory delegation than is at issue here. *Id.* at 337 (statute required fees to be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts*") (emphasis added).

Second, *Benzene* presented views on the nondelegation doctrine that did not even reflect the position of a majority of the Court,[5] and construed a statute that

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[5] *See Benzene*, 448 U.S. at 717 n.30 (Marshall, J., joined by three other Justices, found that the statute posed no nondelegation problem), 664 n.1 (Powell, J., "express[ed] no view" on the nondelegation issue).

delegated far more broadly than the Clean Air Act's NAAQS provisions. *See* p. 26, *supra*. In addition, the factual context of this case differs fundamentally from that of *Benzene*. There, OSHA had set a benzene standard at 1 ppm, though evidence of harm was lacking even at levels an order of magnitude higher:

> OSHA acknowledged that there was no empirical evidence to support the conclusion that there was any risk whatsoever of deaths due to exposures *at 10 ppm*. What OSHA relied upon was a *theory* that, because leukemia deaths had occurred at much higher exposures, some (although fewer) were also likely to occur at relatively low exposures. The Court of Appeals specifically held that its conclusion that the number was "likely" to be appreciable was unsupported by the record.

Benzene, 448 U.S. at 652 n.60 (emphasis added). By contrast, EPA based the fine particle NAAQS on numerous scientific studies, whose validity was accepted by the D.C. Circuit, App. 55a-56a, showing a statistically significant relationship between fine particle concentrations and death and illness (including hospital admissions) at PM2.5 long-term mean daily concentrations of 16 to 21 µg/m3. 62 Fed. Reg. 38676/1, JA(PM) 26; SP E-8 to E-10, JA(PM) 2224-28. EPA set the annual standard, not orders of magnitude below this range, but just below its lower end: at 15 µg/m3. 62 Fed. Reg. 38676/2, JA(PM) 26.[6] EPA

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[6] Indeed, the 15 µg/m3 annual standard is well *above* the lower limit of long-term mean daily concentrations (11 µg/m3) found to be positively associated with mortality at "nearly" statistically significant levels. 62 Fed. Reg. 38676/1, JA(PM) 26. *See Ethyl*, 541 F.2d at 28 n.58 ("Agencies are not limited to scientific fact, to 95% certainties.").

set the 24-hour standard at 65 µg/m3, above the 98th percentile of 24-hour concentrations in all but one of the studies documenting associations between PM2.5 and mortality. Memorandum of 9/30/96 from Patricia Koman, JA(PM) 3508. Likewise, the new ozone NAAQS is based on scientific studies, not questioned by the D.C. Circuit, documenting adverse health effects *at* the level of the new NAAQS itself. *See* pp. 6-7, 9, *supra*.

In short, EPA's fine particle and ozone NAAQS are based not on theories or extrapolation, but on evidence of death and illness in the range in which those standards were set. Thus, this case does not present a situation where EPA has attempted to set NAAQS at zero, App. 13a (speculating that EPA's interpretation might allow the agency to set NAAQS at zero), or (as in *Benzene*) substantially below the level where adverse health effects are documented. The D.C. Circuit had no basis to offer an advisory opinion on the constitutionality of such hypothetical NAAQS. U.S. Const., Art. III, § 2 (judicial power applies to "[c]ases" and "[c]ontroversies"). Likewise, the D.C. Circuit had no basis for requiring EPA to mount a constitutional defense of its decision "not to set a standard at a *lower* level" than the levels chosen. App. 10a (emphasis added). The nondelegation argument in this case was raised only by parties seeking *less* stringent NAAQS.

Here, the D.C. Circuit did not even claim that EPA had set the NAAQS below the levels at which the scientific evidence documented adverse health effects. Instead of focusing on what EPA *did*, the court speculated on what the agency's statutory interpretation would allegedly *allow* the agency to do in some future proceeding: "EPA's formulation of its policy judgment leaves it

free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog." App. 13a. But EPA asserted no such broad discretion, and even if it had, that assertion would raise, not a *constitutional* issue, but a *statutory* one – *i.e.*, whether the agency's interpretation passes muster under *Chevron* as a valid interpretation of the Act. In light of the Act's express public health mandate, and Congress's intent to prevent adverse effects on sensitive individuals, *see* pp. 18-22, *supra*, there is no colorable argument that the Act would allow concentrations remotely approaching London's Killer Fog – or even at the level of the prior, demonstrably inadequate NAAQS. Moreover, under the Act EPA would not be free to set NAAQS at zero based on "hunches or wild guesses," but only if such a level could be "rationally justified." *See* p. 22, *supra*. Such a fact pattern is not presented in this case, and in any event the D.C. Circuit erred in suggesting that it would present a nondelegation problem. *Benzene*, 448 U.S. at 677 (Rehnquist, J., dissenting) (the original OSHA bill – which in then-Justice Rehnquist's view posed no nondelegation problem – "would have required the Secretary, in regulating toxic substances, to set the permissible level of exposure at a safe level or, if no safe level was known, at *zero*") (emphasis added). *See also* App. 93a (Silberman, J., dissenting) (the nondelegation doctrine addresses "the scope of the [agency's] discretion," not "the regulatory consequences of [the agency's] interpretation of the statute").

II. THE D.C. CIRCUIT'S RULING CONCERNING IMPLEMENTATION OF THE REVISED OZONE NAAQS CONTRAVENES THE ACT.

Once NAAQS are set, the Act requires that areas where air quality violates the NAAQS be designated as nonattainment areas, and that specified steps be taken to bring those areas into attainment. The Act prescribes generic provisions concerning nonattainment areas in Subpart 1 of Part D (§§ 171-179B, 42 U.S.C. §§ 7501-7509a), supplemented by pollutant-specific provisions in Subparts 2-5 (§§ 181-192, 42 U.S.C. §§ 7511-7514a). The ozone-specific program in Subpart 2 (§§ 181-185B, 42 U.S.C. §§ 7511-7511f) is based on the pre-existing ozone NAAQS (which was set at 0.12 parts per million, averaged over one hour), App. 32a, while Subpart 1 applies generically to any NAAQS (including any revised NAAQS). 172(a)(1)(A).

In a ruling on which no one has sought certiorari, the D.C. Circuit correctly held that the ozone-specific program in Subpart 2 does not preclude EPA either from promulgating a revised ozone NAAQS, or from issuing nonattainment area designations under that NAAQS. App. 34a-37a. The court incorrectly held, however, that "EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." App. 34a. Because this reading contravenes the plain meaning of the Act and produces absurd results, application of Subpart 1 to nonattainment areas under the new ozone NAAQS should have been upheld under *Chevron* Step One, or at a very minimum, as a reasonable interpretation under *Chevron* Step Two.

Moreover, as interpreted by industry respondents and Ohio, the D.C. Circuit's ruling does not simply require EPA to implement the new standard through a different statutory tool (Subpart 2 instead of Subpart 1). Rather, industry respondents and Ohio read the D.C. Circuit's decision as precluding EPA from implementing the new standard *at all, ever*. Appalachian Power Rsp. to Cert. Petitions at 28 ("the 1990 Amendments to the Act 'must preclude the EPA from requiring areas to comply . . . *with a more stringent ozone NAAQS*') (emphasis added by Appalachian Power) (quoting App. 40a). *Accord, id.* 9, Ohio Rsp. at 2. This reading contravenes the Act, reduces the statutorily mandated NAAQS review process to a pointless exercise, and leaves large numbers of Americans to continue suffering asthma attacks and other adverse health effects that would be prevented by the new NAAQS.

A. The Subpart 1 Classification and Attainment Date Provisions Apply to the New Ozone NAAQS.

The D.C. Circuit's holding that the classifications and attainment dates of Subpart 2 apply to the new eight-hour NAAQS contravenes the plain language of the Act. By their express terms, the classification provisions of Subpart 1 apply to "*any* revised standard, *including a revision of any standard in effect on November 15, 1990,*" § 172(a)(1)(A) (emphasis added), and the attainment date provisions track that applicability. *Id.* (providing that classification under § 172(a)(1) is *inter alia* "for the purpose of applying an attainment date pursuant to paragraph (2)" – *i.e.*, pursuant to § 172(a)(2)). The D.C.

Circuit's attempts to avoid this conclusion will not withstand scrutiny.

The D.C. Circuit asserted that the Subpart 1 classification and attainment date provisions are ousted by §§ 172(a)(1)(C) and (a)(2)(D), which provide that the § 172(a) classifications and attainment dates do not apply to nonattainment areas for which classifications and attainment dates "are specifically provided under other provisions of this part." The D.C. Circuit found that these ouster provisions apply to the new eight-hour NAAQS, basing this finding on the court's assertion that § 181(a)(1) provides classifications and attainment dates for all ozone nonattainment areas. App. 37a-38a. This conclusion flies in the face of the plain language of the Act, with respect both to areas with a design value less than 0.121 and areas with a design value of 0.121 or greater.

1. Areas violating the new NAAQS, with design value less than 0.121. For areas with a design value less than 0.121, § 181(a)(1) specifies no classifications or attainment dates. Specifically, the table set forth in § 181(a)(1) provides classifications and attainment dates only for areas with a design value ≥0.121 – a level roughly approximating the level of the pre-existing one-hour NAAQS. App. 32a-33a. Thus, § 181(a)(1) offers no classifications or attainment dates for the numerous areas where air quality meets the pre-existing one-hour NAAQS, yet violates the new eight-hour NAAQS. As Judge Tatel observed, "it is . . . difficult to see how Subpart 2 can 'specifically provide[ ]' attainment dates for areas that are designated nonattainment under the new standard but are not covered by Table 1." App. 84a.

Indeed, a recent D.C. Circuit decision holds that § 181(a)(1) does not set forth classifications or attainment dates even for all nonattainment areas under the pre-existing one-hour standard. *American Petroleum Inst. v. USEPA*, 198 F.3d 275, 278-80 (D.C. Cir. 2000) (holding that "sub-marginal" areas – *i.e.*, areas that are in nonattainment of the one-hour standard but have a design value <0.121 – are not covered by Table 1 of § 181(a)(1); Table 1 and nonattainment status "overlap but are distinct"). The *API* decision confirms an observation made by the D.C. Circuit here. App. 36a ("not all areas designated nonattainment for ozone will have design values of 0.121 ppm or higher"). These statements undermine the D.C. Circuit's assertion that "Subpart 2 specifically provides classifications and dates for *all* areas designated nonattainment under *any* ozone NAAQS." App. 38a (emphasis added).

2. Areas violating the new NAAQS, with design value ≥0.121. For areas with a design value greater than or equal to 0.121, § 181(a)(1) provides classifications and attainment dates – but only for the pre-existing one-hour NAAQS, not for the new eight-hour NAAQS. Applying the § 181(a)(1) classifications and attainment dates to the new eight-hour NAAQS would produce absurd results – specifically, many areas would be assigned attainment dates *that predate the July 1997 promulgation of the new NAAQS*. For example, areas classified as marginal under the new NAAQS would be required to attain by November 15, 1993, and areas classified as moderate would be required to attain by November 15, 1996. 181(a)(1) (table 1). Thus, though the D.C. Circuit expressed concern about the attainment dates associated with EPA's interpretation,

App. 40a-41a (expressing concern that under EPA's interpretation, some areas might have to attain the new eight-hour NAAQS before expiration of the Subpart 2 deadlines for attaining the pre-existing one-hour NAAQS), it is *the D.C. Circuit's own interpretation* that produces anomalous attainment dates. Stated simply, an interpretation resulting in attainment deadlines that predate the very existence of the corresponding NAAQS cannot possibly be a valid reading of the Act. Tellingly, the D.C. Circuit never confronted, much less offered a response to, this absurd implication of its holding.[7]

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[7] The Act does provide a mechanism for extending attainment deadlines in the event that areas are newly designated to nonattainment for ozone after enactment of the 1990 Amendments, § 181(b)(1), but that provision is inapplicable to designations under the new ozone standard: § 181(b)(1) applies only to areas designated nonattainment "under section 7407(d)*(3)*." (Emphasis added.) As the D.C. Circuit recognized, however, nonattainment area designations under the new ozone NAAQS will be made pursuant to § 107(d)*(1)*, 42 U.S.C. § 7407(d)*(1)*. App. 36a. Thus, the anomaly caused by the D.C. Circuit's reading remains.

Moreover, § 181(b)(1) applies only to areas that had been "designated attainment or unclassifiable" during the round of designations (made pursuant to § 107(d)(4)) that followed shortly after enactment of the 1990 amendments. App. 42a. Thus, even apart from the insurmountable problem noted in the previous paragraph, the extension authority of § 181(b)(1) would not apply to the numerous areas that were designated *non*attainment in the post-1990 § 107(d)(4) designations – among which are numerous metropolitan areas, including virtually the entire eastern seaboard from Northern Virginia through Connecticut, as well as Chicago, Houston, and Los Angeles, among others. 40 C.F.R. §§ 81.300 *et seq.*

B. The Subpart 1 Control Measure Provisions Apply to the New Ozone NAAQS.

The D.C. Circuit likewise erred by ruling (App. 34a) that the new eight-hour NAAQS must be implemented only in accordance with the "control measures" of Subpart 2. Indeed, the court did not even point to a statutory provision that allegedly ousted the Subpart 1 provisions concerning control measures.

No such provision exists. Section 172(b) requires states to submit, no later than "3 years from the date of the nonattainment designation," pollution control plans implementing new NAAQS – and § 172(b) contains no ouster provision comparable to § 172(a)(1)(C) or (a)(2)(D). Nor is such an ouster provision contained in § 172(c), which sets forth nine specific requirements that a control plan must meet – including the requirement that the plan "provide for attainment of the national primary ambient air quality standards." § 172(c)(1). *See also* H.R. Rep. 490, 101st Cong., 2d Sess. 223 (1990) ("1990 House Report") (§ 172(c) "establishes requirements for *all* nonattainment area plans, *including those for ozone* . . . nonattainment areas") (emphasis added).

Moreover, the D.C. Circuit's interpretation concerning control measures leads to absurd results that simply compound the unworkability of the court's interpretation concerning classifications and attainment dates. Not only would the D.C. Circuit's ruling result in areas being required to attain the new NAAQS before that NAAQS was even promulgated, it would result in pollution control plan submission deadlines falling due before that promulgation date as well.

Under the D.C. Circuit's interpretation concerning classifications and attainment dates, areas with a design

value ≥0.121 would be classified as Marginal, Moderate, Serious, Severe or Extreme pursuant to § 181(a)(1) Table 1, and would be assigned attainment dates from the table. Under the D.C. Circuit's interpretation concerning control measures, areas would then be subject to the Subpart 2 control measure requirements corresponding to their classification.

In particular, under the D.C. Circuit's reading all areas designated Moderate, Serious, Severe or Extreme must submit control plans *"[b]y no later than 3 years after November 15, 1990"* that "provide for such specific annual reductions in emissions of volatile organic compounds and oxides of nitrogen as necessary *to attain the national primary ambient air quality standard for ozone by the attainment date applicable under this chapter."* § 182(b)(1)(A)(i), 42 U.S.C. § 7511a(b)(1)(A)(i) (emphasis added).[8] Likewise, *"[w]ithin 4 years after November 15, 1990,"* all areas designated Serious, Severe or Extreme must submit "[a] demonstration that the plan, as revised, will provide for *attainment of the ozone national ambient air quality standard by the applicable attainment date."* § 182(c)(2)(A) (emphasis added).[9] In short, the D.C. Circuit's interpretation will result in pollution control plans implementing the new NAAQS being deemed to have been due *before* the NAAQS was even promulgated.[10]

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[8] This requirement, applicable on its face to Moderate areas, is also extended to Serious, Severe and Extreme areas by § 182(c), (d) and (e).

[9] This requirement, applicable on its face to Serious areas, is also extended to Severe and Extreme areas by § 182(d) and (e).

[10] The Act does provide a mechanism for extending control plan submission deadlines in the event that areas are newly designated to nonattainment for ozone after enactment of the

Thus, as soon as areas are designated nonattainment under the new NAAQS, they will be many years out of compliance with the Subpart 2 control plan submission deadlines – and will by virtue of that noncompliance face loss of highway funds, stricter requirements for siting of new industry, and imposition of a federal pollution control plan, unless their noncompliance is corrected within eighteen months to two years after EPA makes a finding of delinquency. §§ 179, 110(c)(1), 42 U.S.C. §§ 7509, 7410(c)(1). This absurd reading cannot possibly be a valid interpretation of the Act.

C. Industry's and Ohio's Interpretation of the D.C. Circuit's Decision Simply Compounds the Unlawfulness of that Decision.

Industry respondents and Ohio read the D.C. Circuit's decision as precluding EPA from requiring compliance with the new ozone NAAQS *at all, ever*. *See* p. 38, *supra*. That drastic reading conflicts with the Act – indeed, with the D.C. Circuit's *own interpretation* of the Act – and produces results that are absurd and in conflict with the Act's core public health purpose.

1990 Amendments, § 181(b)(1), but for reasons stated *supra* at 41 n.7, that provision is inapplicable to designations under the new ozone standard.

(1) The Assertion that Areas Need *Never* Attain the New NAAQS Conflicts With the Act, and Even With the D.C. Circuit's Own Erroneous Interpretation of the Act.

Industry and Ohio cannot have it both ways: they cannot advocate an interpretation of the Act that presupposes the existence of Subpart 2 classifications and attainment dates for the new NAAQS, while simultaneously denying that Subpart 2 imposes *any* date for attainment of that NAAQS.

Stated simply, either Subpart 2 imposes classifications and attainment dates under the new NAAQS, or it does not. If Subpart 2 imposes such classifications and dates, those classifications and dates can only be the ones in § 181(a)(1) Table 1 – and those Table 1 attainment dates include dates that *predate* promulgation of the 1997 NAAQS. *See* p. 40, *supra*.

If on the other hand Subpart 2 imposes *no* classifications and attainment dates for the new NAAQS, then the ouster provisions of § 172(a)(1)(C) and (a)(2)(D) do not apply, and there is no bar to EPA applying the Subpart 1 classification and attainment date provisions – and of course, the Subpart 1 control measure provisions, which have no ouster clause in any event.

(2) The Assertion that Areas Need *Never* Attain the New NAAQS Reduces the Statutorily Mandated Revision of NAAQS to a Pointless Exercise, and Contravenes the Act's Core Public Health Purpose.

The assertion that areas need *never* comply with the new NAAQS reduces the Act to an absurdity. The D.C. Circuit correctly concluded that the 1990 Amendments

left unchanged EPA's *statutory* obligation to revise NAAQS as appropriate and make nonattainment designations pursuant to revised NAAQS. App. 34a-37a. To then conclude that revised NAAQS cannot be implemented would render the statutory revision and nonattainment designation process futile. *Rosado v. Wyman*, 397 U.S. 397, 415 (1970) (where statute required reappraisal of a prior program, Court rejected an interpretation that "would render the . . . reappraisal a futile, hollow, and, indeed, a deceptive gesture"); *United States v. Wilson*, 503 U.S. 329, 334 (1992) ("absurd results are to be avoided"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("avoid unreasonable results whenever possible").

Moreover, the assertion that the new NAAQS need never be attained is fundamentally at odds with the special – and central – role of the public-health-based NAAQS process in the Clean Air Act. *See* pp. 18-22, *supra*. Here EPA has concluded that, even at ozone concentrations meeting the previous NAAQS, extensive adverse health effects are occurring – including hospitalization for respiratory ailments, reductions in lung function, and respiratory symptoms. Pp. 6-9, *supra*. To rule unenforceable a standard designed to protect against those effects is to abandon the affected individuals to their fate. It would be difficult to envision a result more diametrically opposed to the core intent of the Act.

D. As Amended on Rehearing, the D.C. Circuit's Decision Still Contravenes the Act.

Based on changes made by the D.C. Circuit on rehearing, App. 80a-81a, Judge Tatel concluded that the revised opinion "leaves open the possibility that the new ozone standard can be implemented *in areas that have*

attained the old standard." App. 89a (emphasis added). This limitation on implementation of the new standard contravenes the Act.

The approach proposed by Judge Tatel does correctly recognize that Subpart 2 provides no classifications or attainment dates for areas that violate the new NAAQS, yet have a design value less than 0.121. App. 84a-85a. Absent classifications and attainment dates under Subpart 2, "nothing precludes enforcement of the new standard under Subpart 1." App. 88a.

However, Judge Tatel's proposed approach would leave undisturbed the D.C. Circuit's incorrect ruling that Subpart 2 *does* set forth classifications and attainment dates under the new NAAQS for areas with a design value of *0.121 or higher*. Judge Tatel asserted – as did the original panel opinion – that this ruling implements Congress's alleged intent to "extend[ ] the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS." App. 83a (quoting panel). This argument is meritless.

First, far from allowing *longer* attainment deadlines for areas with a design value of 0.121 or higher, application of Subpart 2 to the new NAAQS would have exactly the opposite effect: it would for many areas produce attainment dates that *predate* promulgation of that NAAQS. *See* p. 40, *supra*. That absurd interpretation cannot be a valid reading of the Act.

Second, the D.C. Circuit fundamentally mischaracterized the program enacted in 1990. That program did not grant polluted areas an *entitlement* to any specific amount of time to attain even the one-hour NAAQS (much less the eight-hour NAAQS). Rather, with respect to the one-hour NAAQS, Congress expressly required attainment *"as expeditiously as practicable* but not later

than the [applicable attainment] date." § 181(a)(1) (emphasis added). *Accord*, 1990 House Report at 229 (Subpart 2 attainment dates "are *outside* limits intended to provide a reasonable target for a large class of nonattainment areas. In the case of each individual nonattainment area, the bill continues the responsibility to attain *as expeditiously as practicable*. The objective is to achieve the standard *as early as possible* with effective and enforceable measures and without gaming by the States, industry, and others.") (emphasis added); S. Rep. 228, 101st Cong., 1st Sess. 37 (1989) (the § 181 attainment dates are "*final* deadlines;" "The generic requirement in section 172(a) for attainment *as expeditiously as practicable*, of course, applies to attainment of the ozone standard. For example, if a severe area can attain the standard in *less* than fifteen years, it *must* do so.") (emphasis added).

At the same time when it wrote the Subpart 2 provisions requiring attainment of the *existing* ozone standard as expeditiously as practicable, Congress carefully crafted a Subpart 1 program designed *inter alia* to attain "any *revised* standard, including a revision of any standard in effect on November 15, 1990." § 172(a)(1)(A) (emphasis added). This extensively revised Subpart 1 program includes provisions for classifications, attainment dates (conditioned by an obligation to attain "as expeditiously as practicable," 172(a)(2)(A)), and other detailed requirements. §§ 171-179B. Because the 1990 Amendments extensively rewrote Subpart 1, the D.C. Circuit was simply mistaken in asserting that the 1990 Amendments carried forward the pre-existing Subpart 1 provisions unchanged. *See* App. 32a (asserting erroneously that Congress simply

"redesignat[ed] the original [pre-1990-Amendment nonattainment] provisions as Subpart 1"). Far from being some pre-existing relic that Congress intended to shunt aside, Subpart 1 reflects the carefully considered contemporaneous intent of the *same* Congress that enacted Subpart 2. That Congress's express intent (embodied in § 172(a)(1)(A)) to apply Subpart 1 to revised NAAQS must be respected.

Thus, for areas that are in violation of both the old and new standards, the Act requires that they proceed simultaneously towards compliance with Subpart 2 (with respect to the old standard) and Subpart 1 (with respect to the new standard). There is nothing unusual in requiring areas to move simultaneously towards achievement of more than one NAAQS: as demonstrated by existing NAAQS for pollutants other than ozone, a single pollutant can be subject to more than one primary NAAQS. 40 C.F.R. Part 50. Such simultaneous implementation is not only required by the express terms of Subparts 1 and 2, but also avoids the multi-year delays in achievement of clean air that would be produced by Judge Tatel's sequential approach. Millions of Americans living in areas that are violating both the old and new standards have been waiting for decades to breathe air that protects their health. As the record in EPA's ozone rulemaking abundantly demonstrates, attainment of the old standard will still leave them suffering numerous ozone-induced health impairments. For the sake of their health, it is important that planning to attain the new, more protective ozone standard start now, and not be held in abeyance until years in the future, when the old standard has been attained.

Finally, a third reason why Judge Tatel's approach is unlawful is that (at least with respect to areas with a

design value of 0.121 or higher) it does nothing to remedy the D.C. Circuit's erroneous ruling concerning control measures. *See* pp. 42-44, *supra*. That ruling (App. 34a) was not amended on rehearing.

CONCLUSION

For the foregoing reasons, the Court should hold that the Clean Air Act provisions governing NAAQS, and EPA's interpretation of those provisions, do not represent an unconstitutional delegation, and should further hold that the Subpart 1 classifications, attainment dates, and control measures apply to all nonattainment areas under the 1997 ozone NAAQS. (ALA takes no position concerning EPA's Question #2.)

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Respectfully submitted,

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